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NUMBER _____

IN THE

SUPREME COURT OF THE UNITED STATES

January Term, 1991

SHIRLEY SIMNICK
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is it error to allow pre-trial incarceration when a conviction is unlikely and unsustainable? Did this violate Simnick's Fifth, Sixth, and Eighth Amendment rights?

2. Was the district court's finding that "... no condition or combination of conditions will reasonably assure the safety of any other person and the community ..." upon the release of Shirley Simnick supported by clear and convincing evidence?

3. May a district court base its decision to imprison, prior to trial--without bond, purely on hearsay? Is this a violation of the Sixth Amendment?

4. Can pre-trial incarceration be ordered for the purpose of allowing the government unimpeded investigatory license of the detailed business? Is

this a violation of Fifth Amendment due process?

5. There is no specific written reason for a decision to detain as required under 3142(i). Is this error?

6. Does pre-trial detention of Shirley Simnick, in the absence of a grand jury indictment, violate her right to due process under the Fifth Amendment of the Constitution of the United States?

7. The trial court prevented new evidence from being submitted (Tr. Vol. 3, pg. 3, lines 3-5; Tr. Vol. 3, pg. 7, lines 20-25; pg. 8, lines 1-5.)

The Petitioner was not allowed to examine the alleged complaining witness (even her complaint is hearsay) or the Pretrial Investigation Officer, or anyone else.

How can this be a trial de novo under the statute?

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January Term, 1991

SHIRLEY SIMNICK,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS SEVENTH CIRCUIT

The Petitioner, Shirley Simnick requests that a Writ of Certiorari issue to review the judgment of the United States District Court for the Northern District of Illinois, Eastern Division on November 9, 1990, the ruling of the Seventh Circuit Court of Appeals on December 19, 1990, upholding the Trial

Court's findings, and the Seventh Circuit's denial of Appellant's Motion for Rehearing on January 8, 1991. Mrs. Simnick has been held in prison since October 4, 1990, contrary to the recommendation of the parole officer, without an indictment. She is accused of kidnaping, but is being held so that evidence can be accumulated to secure an indictment for prostitution-related allegations.

OPINION BELOW

The opinion of the District Court is reprinted in the Appendix at pages A-13 through A-17. The opinion of the Seventh Circuit Court denying relief is reprinted in the Appendix at pages A-2 through 4. The Order denying Petitioner's Motion for Re-hearing for Release is reprinted in the Appendix at page A-1. None of the

opinions are reported. Two "secret" orders have been issued to allow additional time to secure an indictment for prostitution. The orders are reprinted in the Appendix at pages A-5 and -6 and A-7 and -8.

JURISDICTION

Petitioner's Motion for Re-hearing was denied on January 8, 1991. The jurisdiction of the Supreme Court of the United States is involved under 28 U.S.C. 1253. In addition, the Bail Reform Act of 1984, 18 U.S.C. 3142, provides for the petition to the Supreme Court on the issue of pre-trial detention.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V --

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand jury, . . .

Amendment VI --

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . ., and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment VIII --

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATUTES INVOLVED

Title 18 U.S.C. 1201(a): Kidnaping

(a) Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away or holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof, when:

Title 18, U.S.C. 1201(a)(1);

(1) the person is willfully transported in interstate or foreign commerce:

Title 18 U.S.C. Section 3142(e);

(e) Detention.--If after a hearing pursuant to the provisions of subsection (f), the judicial officer finds that no condition or combination of and the safety of any other person and the community, he shall order the detention of the person prior to trial. In a case described in (f)(1), a rebuttable presumption arises that no condition or combination of conditions will reasonably assure the safety of any other person and the community if the judge finds that--

Title U.S.C. 18 Section 3142(f)(2)(B);

(B) a serious risk that the person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten,

injure, or intimidate, a prospective witness or juror.

Title 18 U.S.C. Section 3142(g);

Factors to be considered.--The judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, take into account the available information concerning--

Title 18 U.S.C. Section 3142(i);

(i) Contents of detention order. In a detention order issued pursuant to the provisions of subsection (e), the judicial officer shall--

Title 18 U.S.C. 3162(a)(1):

(a)(1) If, in the case of any individual against whom a complaint is filed charging such individual with an offense, no indictment or information is

filed within the time limit required by section 3161(b) as extended by section 31619h) of this chapter, such charge against that individual contained in such complaint shall be dismissed or otherwise dropped. In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which lead to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.

STATEMENT OF THE CASE

This case concerns a pre-trial, pre-indictment incarceration, without bond, of Shirley Simnick under the 1984 Bail Reform Act. She is accused of kidnaping, but has not been indicted because the government claims the case is too complicated. There is no support for any of the allegations of the Government except hearsay. In fact, the Pretrial Services Officer recommended pre-trial release. (See Appendix at pages A-9 through 12. Shirley Simnick has now been incarcerated, without bond, since October 5, 1990 for a crime on which she cannot be convicted, absent considerably more evidence than is presently before this Court. The government's entire position which resulted in pretrial, pre-indictment incarceration--contrary to the written recommendation of the Pretrial

Services Office--without bond, is restated herein.

None of the adverse "facts" in the Brief Restatement of of Issues are conceded as being true.

A. BRIEF RESTATEMENT OF ISSUE.

On October 4 and 5, 1990, Mary Price and Linda Anderson visited their relative, Dorothy Ciercierski, Shirley Simnick's sister, who was confined in the hospital for treatment of cancer. (Tr. Vol. 1, P. 77, lines 15-25, P. 78, lines 1-12.) While at Simnick's residence, Price and Anderson met Rosie Krager, an F.B.I. informant. (Tr. Vol. 1, P. 79, lines 17-24.)

F.B.I. Special Agent Royden Rice had placed the Simnick residence under surveillance for several months prior to Anderson's and Price's arrival and had utilized Krager as an informant in his

investigation of M & C Consultants, an "escort service" operated out of Simnick's residence. (Tr. Vol. 1, P. 10, lines 1-12.)

Rice had already concluded prior to October 4, 1990 that M & C Consultants was a "front" for prostitution. (Tr. Vol. 1, P. 5, lines 2-14.) Rice Claims that Shirley Simnick became aware of the investigation and called a meeting of her "girls" on September 16, 1990, "... at the Holiday Inn on W. 127th Street." Krager attended this meeting wearing a wire transmitting device. Supposedly Simnick exhorted her girls at the meeting to "stay loyal" and gave them instructions on how to thwart the F.B.I. (Tr. Vol. 1, P. 11, lines 6-14, lines 1-13.)

Allegedly Simnick confronted Krager and accused her of being an F.B.I. informant. After several attempts by

Simnick to extract a confession, Krager admitted active complicity in the F.B.I. investigation. (Tr. Vol. 1, P. 14, lines 5-13.)

At this point, Simnick allegedly pulled a hand gun on Krager and questioned Krager about cooperation with the F.B.I. [1] Simnick, according to the third-party hearsay, indicated that the F.B.I. could not protect Krager forever. (Tr. Vol. 1, P. 14, lines 14-24; P. 15, lines 9-16.)

Simnick allegedly searched Krager's purse and found the small slip of paper she was carrying with the names and numbers of the F.B.I. agents conducting

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[1] There is no evidence of this in the record except for the third-party hearsay allegations of an officer who has no personal knowledge. In fact, the undisputed evidence is that no gun was ever located. Tr. P. 62, lines 9-17.

the investigation. (Tr. Vol. 1, P. 16, lines 18-25; Tr. Vol. 1, P. 17, lines 1-10.)

Simnick then allegedly ordered Krager to get into Simnick's car. Simnick purportedly covered Krager with a blanket and drove to her (Simnick's) attorney's office. The attorney was not at his office when the entourage arrived. (Tr. Vol. 1, P. 17, lines 12-18; P. 18, lines 1-13.)

Krager accompanied Anderson, Price, and Simnick across the state line to Hammond, Indiana where they visited Dorothy Ciercierski in the hospital on this same date. (Tr. Vol. 1, P. 80, lines 10-16, P. 81, lines 2-24, P. 92, lines 20-25, P. 93, lines 1-6, P. 107, lines 5-14.) During the hospital visit, Rosie Krager left the hospital room to have a smoke and get a cup of coffee. (Tr. Vol. 1, P. 95, lines 16-22.) Mary

Price also left the room about the same time. (Tr. Vol. 1, P. 113, lines 16-25; P. 82, lines 4-24.) According to Harold Ciercierski, Krager left the hospital room by herself and no one accompanied her[2] (Tr. Vol. 1, P. 95, lines 21-22.) and was gone approximately thirty minutes (Tr. Vol. 1, P. 95, lines 23-24.) Security guards were all over the hospital. They carried radios and were clearly identifiable by the uniforms they wore (Tr. Vol. 1, P. 94, lines 17-25; P. 95, lines 1-11. On the way back from the hospital, Anderson, Price, Simnick, and Krager stopped at Denny's to get something to eat. (Tr. Vol. 1, P. 108, lines 22-25; P. 109, lines 1-4.)

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2 This is not hearsay but unrefuted live testimony. All of the testimony supporting the position of Simnick was live testimony subject to cross-examination.

Anderson and Price watched Krager leave Simnick's house. Nobody followed Krager, attempted to block her way, or beat on the glass of Krager's Blazer. (Tr. Vol. 1, P. 109, lines 10-25; P. 110, lines 2-5).

Earlier in the day, Krager's husband had brought Rosie's keys to Simnick's residence and left them in the custody of Linda Anderson. Anderson promised to give the keys to Rosie and actually did so. Rosie had these keys in her purse when she visited the hospital and left Simnick's residence. (Tr. Vol. 1, P. 110, lines 12-20 [Appendix P. 30].)

B. COURSE OF PROCEEDINGS IN THE DISTRICT COURT

Petitioner, Shirley Simnick, was arrested based on a complaint charging her with kidnaping F.B.I. informant, Rosemary Krager, on October 4, 1990. (Tr. Vol. 2, P. 4, lines 14-23)

(Violation Title 18 U.S.C. Section 1201(a).) Acting on the Complaint, F.B.I. agents arrested Simnick and searched her entire home. They found lots of cash, but no gun. Simnick was incarcerated, instantly, and on October 5, 1990 Magistrate Bernard Weisberg entertained a detention hearing under Title 18 U.S.C. Section 3142(f)(2)(B).

To date, she has not been indicted.[3] At the conclusion of the hearing, Magistrate Weisberg entered a pre-trial detention order containing findings of (1) probable cause that Simnick had committed the crime charged; and (2) that Simnick constituted a "danger to the community" and there was no "condition or combination of conditions" which could

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[3]As of Wednesday, January 23, 1991 she had not been indicted. Unless there is a sealed, or otherwise secret, indictment, she still stands unindicted.

insure the safety of the community if Simnick was released. (Tr. Vol. 1, P. 125, lines 16-25, P. 133, lines 14-18; Tr. Vol. I, P. 135, lines 15-23 and Pre-Trial Detention Order.)[4]

Simnick filed a Petition for Writ of Habeas Corpus as well as an emergency request for District Court review of the Magistrate's ruling on the pre-trial detention. The District Court conducted a hearing on the Motion for Expedited Review and Petition for Writ of Habeas Corpus but received no further evidence[5]. Mrs. Simnick waited in prison for **several weeks** before the transcript of the first

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[4] There is no specific finding about what the danger is. We must speculate it is a danger to the alleged kidnaped victim or no pretense of compliance with 3142(i) is shown.

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[5]Petitioner questions whether this constitutes the required trial de novo.

hearing was available. Motions had to be filed to obtain the transcript. On November 8, 1990, the District Court agreed to set the "de novo" hearing but ordered that no additional testimony would be allowed. (Tr. Vol. 3, P. 7, lines 20-25, Tr. Vol. 3, P. 8, lines 1-5, Tr. Vol. 3, P. 3, lines 3-5.) Thus, cross examination (or even direct examination) of the complaining witness and testimony of Pretrial Services Officer wan not available. At this hearing on the 9th day of November, 1990, the District Court affirmed the Magistrate's Order of pre-trial, pre-indictment incarceration, without bond. Neither the Magistrate nor the District Court gave any reason for their disregard of the findings of the Pretrial Services Report, which had been attached as Exhibit "B" to Appellant's Emergency Request for District Court Review of

Magistrate's Ruling on Pre-Trial Detention.

Simnick timely filed Notice of Appeal to the Seventh Circuit. The Seventh Circuit affirmed the District Court's ruling.

Simnick, by this Petition, invokes this Court's jurisdiction to review the factual and legal sufficiency of the Magistrate's and District Court's finding imposing pre-trial detention under the statute (Title 18 U.S.C. Section 3142(F)(2)(b)).

Simnick remains incarcerated for an alleged kidnaping she will not be convicted for. **This Petition, filed January 23, 1991 is filed after one hundred and eleven (111) days of pre-trial, pre-indictment, incarceration of a presumptively innocent person.**

Mrs. Simnick is being held on what

appears to be merely an improper, unsigned "complaint" which fails to rise to the level of even an Information.

C. SUMMARY OF THE ARGUMENT

1. Is it error to allow pre-trial, pre-indictment incarceration without bond, when a conviction is unlikely and unsustainable?

2. The district court's finding that "... no condition or combination of conditions will reasonably assure the safety of any other person and the community ..." upon the release of Shirley Simnick is not supported by clear and convincing evidence. Is this error?

3. May a district court base its decision to restrain purely on hearsay? Does this violate both Title 18 U.S.C. 3142 (f)(2) (B) and the Sixth Amendment right of confrontation?

4. May pre-trial incarceration be

ordered solely for the purpose of allowing the government an opportunity to investigate the accused for unrelated crimes? Is this a violation of due process?

5. There is no specific written reason for a decision to detain as required under 3142(i). Is this error?

6. May Shirley Simnick, be held without indictment for four months? Does this violate her Fifth Amendment due process? Her speedy trial rights?

7. "Where a new trial is granted in a criminal case, it generally must proceed in all respects as if no trial had been had." Joseph v. State, 359 US 117. "It must be conducted, as far as practicable, in the manner in which it would be conducted if there had not been a previous trial." Northern v. Northeastern R. Co., 59 SC 87. Are the

statutory trial de novo conditions satisfied if the district trial court refuses to hear evidence and restricts itself to a review of the magistrate's record?

REASONS FOR GRANTING THE PETITION

1. THE DISTRICT COURT'S FINDING THAT "... NO CONDITION OR COMBINATION OF CONDITIONS WILL REASONABLY ASSURE THE SAFETY OF ANY OTHER PERSON AND THE COMMUNITY ..." UPON THE RELEASE OF SHIRLEY SIMNICK WAS NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.

The Government's pre-trial detention case rested solely on the hearsay testimony of F.B.I. Special Agent Royden Rice. Rice lacked personal knowledge of most elements of the Government's proof. The Government's "proof" failed to address pre-trial release condition(s), including those routinely imposed to insulate a Government witness from objectionable contact with the Defendant. Since United States v. Salerno, 481 U.S.

739 (May 26, 1987) the Government, in pre-trial detention hearings, has borne the burden of proving, by clear and convincing evidence that no condition or combination of conditions will reasonably assure ... "the safety of any other person in the community...". Salerno at P. 757 and 739.

The Government's proof did not address any alternative condition for release. The Government failed to prove that Simnick had a prior criminal record which was relevant on the issue of release. (Tr. Vol. 1, P. 27, lines 16-22.)

By clear mandate of the statute, the Court was required to address alternative conditions for release and demand of the Government, by clear and convincing evidence, that none of these conditions would satisfy the statute. This the

Government failed to do. Petitioner's continued incarceration in light of the insufficiency of proof in this record is constitutionally impermissible.

> Here, unlike Salerno, there was no--
> "... Business as usual involved(ing) threats, beatings, and murder ..."

See Salerno at P. 744.

Taking the Government hearsay proof in its best light supporting the Government's position, Simnick operated M&C Consultants--a non-violent business of prostitution--supplying prostitution on a fee for service basis. Likewise, the record contains no admission(s) by Mrs. Simnick of violent intentions.

Simnick's continued incarceration under the Magistrate's and District Court's pre-trial, pre-indictment Detention Order is unconstitutional and a violation of due process. There is insufficient evidence to support the

Magistrate's and District Court's finding that "... no condition or combination of conditions would" reasonably assure the safety of Krager if Simnick were released.[6]

When asked by defense counsel why the alleged kidnaping victim could not be protected under the Witness Protection Plan, the Court said:

> "... is that sort of like incarcerating the victim so that the defendant can be free?"

(Tr. Vol. 4, P. 14, lines 6-9.) The Court's statement projected its refusal to acknowledge the possibility of innocence--let alone the accused's constitutional right of presumption of innocence. The record shows no "victim". The Court failed to distinguish between

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[6] The Appellant must speculate that based on the hearsay evidence the Court impliedly found a danger to Krager. The Trial Court failed to follow 3142(i) and specify the danger.

voluntary non-custodial protection of an alleged victim and prison for a presumptively innocent accused. Even so, accepting the Court's argument as reasonable the Court refused to consider any other conditions such as preventing Simnick from using firearms or forcing her to be monitored. (See U.S. v. Knight, 636 F.Supp. 1462 S.D. Fla. 1986.)

The only individual or member of society even theoretically in danger was Krager. Krager could easily be protected without the incarceration of Mrs. Simnick in a number of ways. The Court's ruling expressly ignores the mandate of Salerno. Reversal is mandated.

2. THE HEARSAY EVIDENCE ADDUCED BY THE GOVERNMENT AND RELIED ON BY THE MAGISTRATE AND THE DISTRICT COURT FOR PRE-TRIAL INCARCERATION IS NOT CLEAR AND CONVINCING EVIDENCE UNDER THE DETENTION STATUTE [TITLE 18 U.S.C. SECTION 3142 (F)(2)(b)] AND VIOLATES BOTH THE STATUTE AND THE SIXTH AMENDMENT RIGHT OF CONFRONTATION.

STANDARD OF REVIEW --

The Second Circuit has held that a Court of Appeals has the responsibility to make an independent determination of the release-detention decision. United States v. Delker, 757 F.2d 1390 at P. 1399.

The Second, Fourth, and Sixth Circuits have ruled that a Court of Appeals should not disturb the District Court's decision unless it is clearly erroneous. United States v. Hazime, 762 F.2d 34 (C.A. 6, 1985); United States v. Chimeranga, 760 F.2d 400 (C.A. 2, 1985) at P. 405; and United States v. Williams, 753 F.2d 329 (C.A. 4, 1985) at P. 333.

An expansive review of the Government's testimony in support of detention consisted of "hearsay" exclusively. Royden Rice opined as to what the Government informant Krager and other witnesses would say about Simnick

if called to testify. Rice's personal knowledge, based on her "personal observation" was extremely limited. (Compare Tr. Vol. 1, P. 3, lines 18-25; P. 4, lines 4-23; P. 5, lines 2-14; with Rt. Vol. 1, P. 6, lines 7-25; P. 7, lines 1-6; P. 8, lines 20-25; P. 9, lines 1-9; P. 120, lines 1-12; P. 11, lines 6-24; P. 12, lines 1-23; P. 14, lines 5-24; P. 15, lines 9-25; P. 16, lines 6-25; P. 17, lines 1-17; P. 19, lines 13-16; P. 20, lines 1-9; P. 22, lines 18-24; P. 23, lines 7-25; P. 24, lines 1-25; and P. 25, lines 1-8. Title 18 U.S.C. Section 3142(f)(2)(B) places the burden on the Government to prove not only a Defendant's purported connection with the crime, and probable cause, but, also, the Defendant's "dangerousness" to a witness or the community "... by clear and convincing evidence ..." Salerno, supra

at P. 739.

Neither the Magistrate nor the District Court below had "unbridled discretion" to decide the facts on inferior hearsay evidence which Simnick controverted with live testimony.

Since the May 26, 1987 date of the Salerno decision, few Federal Circuits have attempted to decide whether hearsay evidence, standing alone, can meet the "clear and convincing standard." The evidence must satisfy the "clear and convincing" standard or detention is constitutionally impermissible. United States v. Protas, 786 F.2d 785 (C.A. 7, 1986) at P. 767.

The better rule seems to be that, although the Government may rely exclusively on hearsay evidence at such hearings under the statute it assumes the risk that Defendant may rebut the hearsay with live testimony thereby rendering the

Government's proof inadequate to satisfy the "clear and convincing" dictates of the statue.

In the present case, the live testimony offered by Simnick rebutted every essential element of the Government's hearsay case for detention. (See testimony of defense witness, Mary Price, Linda Anderson, and Harold Ciercierski, Tr. Vol. 1, P. 77, lines 15-25; P. 78, lines 1-12; P. 79, lines 17-24; P. 80, lines 10-16; P. 81, lines 2-24; P. 82, lines 4-24; P. 84, lines 15-19; P. 86, lines 1-12; P. 97, lines 11-25; P. 88, lines 11-25;; P. 89, lines 1-23; P. 90, lines 18-24; P. 91, lines 4-8; P. 92, lines 20-25; P. 93, lines 1-6; P. 94, lines 17-25; P. 95, lines 1-24; P. 97, lines 7-10; P. 98, lines 14-23; P. 101, lines 1-25; P. 102, lines 1-15; P. 105, lines 1-17; P. 107, lines 5-14;

page. 108, lines 8-25; P. 109, lines 1-25; P. 110, lines 1-20; P. 118, lines 10-25; and P. 119, lines 3-8.

Obviously, an examining Court would start with the presumption that some level of proof falls below the "clear and convincing" standard promulgated by Congress. In Salerno, this court distanced itself from the Government's proffered statutory interpretation that Magistrates and District Judges had "unbridled discretion" to order pre-trial detention. The Supreme Court majority mandated consideration of numerous factors including --

> "...**The nature and seriousness of the charges, the substantiality of the Government's evidence against the arrestee**, the arrestee's background and characteristics, and the nature and seriousness of the danger posed by the suspect's release."

Salerno at P. 739 citing Title 18 U.S.C. Section 3142(g).

Hearsay evidence, rebutted by live

testimony, is not sufficiently "substantial" to support pre-trial detention under the statute --especially so in this case. The confrontation clause of the Fifth Amendment to the United States Constitution, as well as "due process" require a higher level of proof for pre-trial detention than that offered by the Government below. None of the eyewitnesses who gave live testimony adverse to the Government were impeached. Whatever standard of review this Court adopts for its review of this case, the Government evidence was clearly insufficient. Furthermore, denial of confrontation rights in light of the weak evidence adduced to support pre-trial detention was not "... harmless error ..." Compare United States v. Hertado, 779 F.2d 1467 (C.A. 11, 1985) at P. 1479 with the evidence in this case.

This is definitely a case where, in light of rebuttal, the hearsay evidence exclusively relied on by Government--"... Is questionable..." at best. In fact, even the Magistrate questioned it. (Tr., Vol. 1, page 134.) A Magistrate and reviewing District Court should require supporting live evidence corroborating the Government's "use of hearsay" before ordering Simnick's incarceration. United States v. Martir, 782 F.2d 1141 (C.A. 2, 1986) at P. 1147; and United States v. Delker, 757 F.2d 1390 (C.A. 3, 1985) at P. 1396. The testimony of these three witnesses constitute Defendant's proffer which, in turn, establishes that Simnick should have been accorded the right --

> "... To confront non-appearing Government witnesses when the Defendant can make a specific proffer to the Court of how the witness' testimony will negate the Government's contention that the Defendant is a danger to the community ..."

See Delker at P. 1398.

The Magistrate's and District Court's reliance on hearsay evidence, rebutted with live testimony, as "substantial" proof which satisfies the "clear and convincing" burden of evidence imposed on the Government for pre-trial detention by Congress under Title 18 U.S.C. Section 3142 is an:

> "...Application to the particular facts of (this) case ..."

which is unconstitutional. See Salerno at P. 745, Note 3.

Simnick's continued incarceration without bail based on such insubstantial evidence is a violation of Simnick's Fifth and Sixth Amendment rights to due process and confrontation as well as her right to be free of excessive bail under the Eighth Amendment.

The decision of the Trial Court should also be examined in light of his

refusal to allow new witnesses to appear at the de novo trial. (Tr. Vol. 4, P. 7, lines 23-25 and P. 8, lines 1-5.

3. **THE EVIDENCE OF "KIDNAPING" WOULD FAIL TO SUPPORT A CONVICTION. IS IT ERROR TO ALLOW PRE-TRIAL INCARCERATION WHEN A CONVICTION IS UNLIKELY AND UNSUSTAINABLE?**

As weak as the hearsay evidence was, if it were supported verbatim by the live admissible testimony of Krager which it was not, and if the trier of fact were to find Krager credible (a doubt the Magistrate had in his findings, See Tr. Vol. 1, P. 134, lines 14-18), nevertheless, the continued freedom of Krager and her numerous opportunities to "escape" was inconsistent with kidnaping.

As a matter of law, Mrs. Simnick would be acquitted based on the evidence before the Magistrate and Trial Court. In U.S. v. Chancey, 715 F.2d 543 (11th

Cir. 1983) the "kidnaping victim" had opportunities to escape but the accused Chancey was still convicted. The appellate court reversed and remanded --finding reasonable doubt as a matter of law. Chancey's "victim" had many opportunities to escape, almost as many as Krager. The Court in Chancey specifically said that the kidnaped victim failed to inform a nearby policeman that she was being held against her will. Likewise, Krager in the instant case failed to enlighten the many security guards at the hospital of her alleged predicament although she had plenty of opportunity to do so. She was probably the first "kidnaped" victim in the U.S. jurisprudence to be allowed to retain the keys to her car and access to the vehicle while in "custody". It is hard to imagine or create a worse case for the government.

4. CAN PRE-TRIAL INCARCERATION BE ORDERED FOR THE PURPOSE OF ALLOWING THE GOVERNMENT UNIMPEDED INVESTIGATORY LICENSE OF THE DETAILED BUSINESS? IS THIS A VIOLATION OF DUE PROCESS?

At the time of the arrest for "kidnaping" the Government was executing a search warrant for unrelated possible causes of action against the alleged prostitution (see Appendix P. 67, Search Warrant).

The real purpose of the arrest was simply to continue to investigate Shirley Simnick. This is implied by the statements of the Assistant U.S. Attorney in trial (Tr. Vol. 4, P. 9, lines 16-25 and P. 10, lines 1-2) predicting a future indictment at an undisclosed time in the future.

The pre-trial incarceration of Shirley Simnick amounts to a cooperative effort on the part of the judiciary and the executive branch to win at any cost

and is a clear abuse of the Prosecutor's Office. This issue will likely be re-raised at trial when the "predicted" indictment arrives on unrelated charges.

5. **THERE IS NO SPECIFIC WRITTEN REASON FOR A DECISION TO DETAIN AS REQUIRED UNDER 3142(i).**

See the Court's Order. (Appendix)

6. **DOES THE PRE-TRIAL DETENTION OF THE DEFENDANT SHIRLEY SIMNICK, IN THE ABSENCE OF A GRAND JURY INDICTMENT, VIOLATE HER RIGHT TO DUE PROCESS UNDER THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.**

Shirley Simnick's original arrest and her subsequent pre-trial detention arises from a complaint alleging a violation of 18 U.S.C. 1201(a).

Since there was no Grand Jury Indictment issued in regard to this matter, Mrs. Simnick's case was not assigned to a District Court Judge after Magistrate Weisberg's ruling of pre-trial detention, on October 9, 1990. Petitioner's counsel encountered diffi-

culty getting a hearing set on the District Court level, due to the fact that no District Court Judge had been assigned. In addition, there appears to have been no formal criminal Information signed by an Assistant United States Attorney. The Clerk of the Northern District of Illinois indicated that there could be no assignment of this case to District Court until an Indictment or Information had been issued by the United States Attorneys' Office. As recently as November 2, 1990, the undersigned was informed that this case was still in Magistrate Weisberg's hands, and that all further hearings would have to be in front of him. Simnick had to ferret out information about whether or not there was a system by which a District Court Judge was assigned to hear emergency cases. The next task was to determine the identity of the particular District

Court Judge who was assigned to emergency duty on the particular date set for the hearing, which, at the time, was scheduled before Weisberg. A hearing before Weisberg at that point would have been pointless, since Mrs. Simnick was seeking District Court review of Weisberg's ruling, not a rehearing by Weisberg himself. Appellant's right to due process under the Fifth Amendment of the United States Constitution has been grievously violated due to the inadequacy of the charging instrument upon which she is being held.

Numerous Grand Jury subpoenas have been issued to various employees, contractors and business associates of Shirley Simnick. It appears that the thrust of this Grand Jury investigation is not regarding the alleged kidnaping charge [18 U.S.C. 1201(a)], but a

possible R.I.C.O. violation (18 U.S.C. 1962) arising out of Mrs. Simnick's business. To date, no indictment of any kind has been issued against Mrs. Simnick, although she has been incar-cerated for well over three (3) months.

The Fifth Amendment of the Constitution of the United States provides that:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."

An "infamous crime" has been defined as one which was punishable by imprisonment for one (1) year or more. U.S. v. Shober, D.C. Pa., 489 F.Supp. 393 The kidnaping statute which Mrs. Simnick allegedly violated carries with it penalties ranging up to life imprisonment.

This Court in Branzburg v. Hayes, 92

S.Ct. 2646 at 2659, 1972, described the dual function of the Grand Jury as:

> "determining if there is probably cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecution."

Along the same lines, the Third Circuit in U.S.A. v. Radowitz, 507 F.2d 109, (3rd Cir. 1974) described the Grand Jury as working to:

> "shield an accused from unwarranted and unfounded charges of involvement in serious crimes by interposing the independent judgment of a Grand Jury"

Further, the Ninth Circuit, in U.S.A. v. Basurto, 497 F.2d 781, (9th Cir. 1974) stated that the Grand Jury's purpose:

> "is to limit a person's jeopardy to offenses charged by a group of his fellow citizens acting independently of either the prosecutor or the judge."

The landmark case on pre-trial detention, U.S.A. v. Salerno, 481 U.S.

739, arose out of a situation in which a defendant, Anthony Salerno, had been indicted on twenty-nine (29) counts of various R.I.C.O. violations. The Petitioner in the instant case had not been indicted with ANY COUNTS of any offense.

As Mrs. Simnick alleged in her original Petition for Writ of Habeas held in pre-trial detention unlawfully to serve the needs of law enforcement authorities as they continue to investigate her business. The F.B.I. had secured the cooperation of one of Mrs. Simnick's employees who was acting as an informant. When the identity of this informant became known to Mrs. Simnick (Simnick maintains that the circumstances were not correctly depicted in Special Agent Royden Rice's testimony of October 9, 1990), the F.B.I. apparently felt that

the effectiveness of its continuing investigation was jeopardized. They apparently were concerned that Mrs. Simnick would take steps to contact potential witnesses, destroy documents, hide evidence or thwart their efforts any one of numerous possible ways. Thus, they embarked on a course of action to remove Mrs. Simnick from the scene; namely, pre-trial detention based on a flimsy kidnaping charge which appears ludicrous after even a modest inquiry into the facts (an adult woman, unrestrained, mingling in several public places with access to her car and car keys is hardly a likely kidnap victim). The foregoing does not imply that Simnick is conceding that she would have taken any steps to thwart the F.B.I. investigation or that there was any evidence she would have destroyed or hidden, merely that these were concerns

on the part of the F.B.I. which would be likely to have motivated the concocting of the "kidnap" story out of an innocuous afternoon and evening spent by Rosemary Krager in the company of Shirley Simnick and her relatives.

Yet, the law enforcement agency, with the cooperation of the United States Attorneys' office, the Magistrate, and the District Court, have managed to hold Mrs. Simnick behind bars, while the R.I.C.O. investigation continues.

This case appears to be the first one under the 1984 Bail Reform Act in which the Trial Court felt the provision requiring an Indictment was extraneous. There is no support for this interpretation of the statute. Accordingly, Simnick is being held under the possibility of future indictment on an unrelated crime.

An Indictment is a pre-requisite. Interestingly enough Justice Marshall predicted these types of problems among others in his dissent in Salerno.

> "The statute does not authorize the Government to imprison anyone it has evidence is dangerous; indictment is necessary."

(U.S. v. Salerno, dissent of Justice Marshall page 763)

> "... the charging instrument is evidence of nothing more than the fact that there will be a trial..."

(continuing page 764).

In the case at bar, even that is currently suspect. Perhaps there will be no trial, only punishment. Perhaps the trial, if any, will not even relate to the matter which allegedly makes Simnick a danger to the community.

The proper remedy for violation of the Speedy Trial Act, 18 U.S.C. 3162(a)(1), due to lack of a filed

indictment (U.S. v. Diaz-Alvarado, 587 F.2d 1002 (9th Cir.) 1978); and due to failure of trial to commence within ninety (90) days of the first day of continuous detention, under 18 U.S.C. Section 3164 (U.S. v. Martinez, 538 F.2d 92a (2nd Cir.) 1976) is pre-trial release and, if shown to be appropriate, dismissal of an "indictment".

CAVEAT

The legislative purpose of the 1984 Bail Reform Act was to give the Courts the power to deny release pending trial to a "small but identifiable group of particularly dangerous defendants as to whom neither the imposition of stringent release conditions nor the prospect of revocation of release can reasonably assume the safety of the community or

other persons.[7] (Emphasis added.)

During the first sixteen (16) months after passage of the Act, the Justice Department reported that Judges had ordered pre-trial detention in eighty percent (80%) of the cases where the Government requested it, and the United States Marshals Service claimed that the 1984 Act had been primarily responsible for a thirty-two percent (32%) increase in prisoner population during the first year of its passage[8].

It is clear that the original legislative purpose to detain a small identifiable group of dangerous people has been completely subverted to allow

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[7] S. Rep. No. 225, 98th Cong. 1st Sess. 6-7 (1983)

---

[8] See Riley, Preventive Detention Use Grows - But Is It Fair? Natl. L.J., Mar. 24, 1986, at 32.

incarceration of a majority of individuals who are presumed to be innocent.

The instant case is a grievous departure from the spirit of the 1984 Bail Reform Act and the Salerno case and indicates the pretrial harms predicted by Justice Marshall in his dissent have become a reality. Mrs. Simnick has never been indicted or otherwise properly charged with the crime that she is being incarcerated for prior to trial. As a matter of law, Government's case of kidnaping against Mrs. Simnick would ail, the Magistrate felt that the Government's star witness was not credible, there was no evidence presented that Mrs. Simnick ever threatened the witness if the latter was going to testify, all the Government could show that Mrs. Simnick was dangerous was merely that she found out Mrs. Krager was an informant, nothing

more; the Magistrate and District Court failed to even consider any of the myriad of conditions of release that the statute requires.

CONCLUSION

The Pre-trial Detention Order recommended by the Magistrate and ultimately upheld by the District Court should be reversed. Mrs. Simnick should be granted immediate bail and release from incarceration.

Respectfully submitted,

/S/

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APPENDIX

U.S. Court of Appeals for the Seventh Circuit Order Denying Motion for Rehearing of Denial of Appellant's Motion for Release. A-1

U.S. Court of Appeals for the Seventh Circuit Opinion dated December 19, 1990. A-2

U.S. District Court Northern District of Illinois Eastern Division Order for Extension of Time dated December 17, 1990. A-5

U.S. District Court Northern District of Illinois Eastern Division Order for Extension of Time dated November 2, 1990. A-7

U.S. District Court, Northern Illinois, Eastern Division, Order for Pre-Trial Detention and Denial of Petition for Writ of Habeas Corpus A-9

District Office Northern Illinois, Judicial Officer Weisberg's Office Pretrial Services Report A-14

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

December 19, 1990

Before

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. HARLINGTON WOOD. JR., Circuit Judge

Hon. RICHARD D. CUDAHY, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee
v.
SHIRLEY SIMNICK,
Defendant-Appellant

No. 90-3634

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division: No. 90 CR 850 Judge George M. Marovich.

This matter comes before the court for its consideration of the "MOTION FOR REHEARING OF DENIAL OF APPELLANT'S MOTION FOR RELEASE" filed herein on December 26, 1990, by counsel for the appellant.

The court remains persuaded that the district court was correct in finding that no combination of conditions would reasonably assure the safety of the community if the defendant were released on bond. Accordingly,

IT IS ORDERED that said motion is DENIED.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

January 8, 1991

Before

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. HARLINGTON WOOD. JR., Circuit Judge

Hon. RICHARD D. CUDAHY, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee
v.
SHIRLEY SIMNICK,
Defendant-Appellant

No. 90-3634

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division: No. 90 CR 850 Judge George M. Marovich.

This matter comes before the court for its consideration of the the following documents:

1. **"APPELLANT, SHIRLEY SIMNICK'S MOTION FOR EXPEDITED APPELLATE REVIEW PURSUANT TO TITLE 18 U.S.C. SECTION 3142 (f)(2)(B)**[sic] filed herein on 11/28/90, by counsel for appellant.

2. **"APPELLANT'S OPENING BRIEF" filed herein on 11/28/90, by counsel for appellant.**

3. **"GOVERNMENT'S RESPONSE IN OPPOSITION TO APPELLANT SHIRLEY SIMNICK'S MOTION FOR RELEASE FROM CUSTODY PENDING TRIAL"** FILED HEREIN ON 12/12/90, BY COUNSEL FOR APPELLEE.

On consideration thereof,

This court construes appellant's motion for expedited appellate review as a motion for release from custody pending trial. See FRAP 9(a) and Circuit Rule 9(s). Next, after careful review of the parties' filings, we concur with the district court's finding that no combination of conditions would reasonably assure the safety of the community if the defendant were released on bond. U.S. v. Portes, 786 F.2d 758 (7th Cir. 1985) Accordingly,

IT IS ORDERED that the appellant's

motion for release from custody pending trial is DENIED.

ORDER FOR GOVERNMENT'S EXTENSION OF TIME IN WHICH TO FILE AN INDICTMENT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

U. S. OF AMERICA	{	No. 89 CJ 1785
	{	
v.	{	
	{	Chief Judge
SHIRLEY SIMNICK	{	James B. Moran

ORDER

Upon the government's motion under Title 18, United States Code, Section 3616(h) (8)(A) and (B) for an extension of time in which to file an indictment in the above-captioned cause,

IT IS HEREBY ORDERED that the time within which to file an indictment against defendant be extended to and including January 24, 1991. The Court finds that the ends of justice served by the extension outweigh the best interests of the public and defendant in a speedy trial for the following reasons:

1. It is unreasonable to expect the

original return and filing of the indictment before December 19, 1990, in light of the need to secure the appearance of individuals before the grand jury, to analyze the records commanded by the grand jury, and to pursue leads as to the identity and location of other individuals involved in the criminal enterprise.

2. Further, the facts upon which the grand jury must base its determination are unusual and complex.

ENTERED:

L/S
JAMES B. MORAN
Chief Judge

DATED: 12/17/90

ORDER FOR GOVERNMENT'S EXTENSION OF TIME IN WHICH TO FILE AN INDICTMENT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

U. S. OF AMERICA	{	No. 89 CJ 1785
	{	
v.	{	
	{	Judge
SHIRLEY SIMNICK	{	Marvin E. Aspen

ORDER

Upon the government's motion under Title 18, United States Code, Section 3616(h) (8)(A) and (B) for an extension of time in which to file an indictment in the above-captioned cause,

IT IS HEREBY ORDERED that the time within which to file an indictment against defendant be extended to and including December 19, 1990. The Court finds that the ends of justice served by the extension outweigh the best interests of the public and defendant in a speedy trial for the following reasons:

1. It is unreasonable to expect the

original return and filing of the indictment before November 4, 1990, in light of the need to secure the appearance of individuals before the grand jury, to analyze the records commanded by the grand jury, and to pursue leads as to the identity and location of other individuals involved in the criminal enterprise.

2. Further, the facts upon which the grand jury must base its determination are unusual and complex.

ENTERED:

L/S
MARVIN E. ASPEN
Acting Chief Judge

DATED: 11/2/90

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Name of Assigned Judge or Magistrate:
GEORGE M. MAROVICH

Sitting Judge/Mag. if Other Than Assigned Judge/Mag.:

_____

Case Number:
90-CR-850

Date:
NOVEMBER 13, 1990

Case Title:
U.S.A. v. SIMNICK

Motion: [In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3d-party plaintiff, and (b) state briefly the nature of the motion being presented]

a) DEFENDANT
b) REQUEST FOR DISTRICT COURT REVIEW OF MAGISTRATE'S RULING ON PRE-TRIAL DETENTION AND PETITION FOR WRIT OF HABEAS CORPUS

Docket Entry: (The balance of this form is reserved for notations by court staff)

(1) _____ Judgment is entered as follows:

(2) __x__ [Other docket entry:]

DEFENDANT'S MOTION REQUESTING DISTRICT COURT REVIEW OF MAGISTRATE'S RULING ON PRETRIAL DETENTION IS GRANTED. THE COURT HAS REVIEWED, AND AGREES WITH, THE

MAGISTRATE'S RULING AND THUS ORDERS CONTINUED PRETRIAL DETENTION. FURTHER, THE PETITION FOR WRIT OF HABEAS CORPUS IS DENIED.

(3) ____ Filed motion of [use listing in "Motion" box above

(4) ____ Brief in support of motion due _____

(5) ____ Answer brief to motion due _____ Reply to answer brief due _____

(6) ____ Hearing on _____ set for _____ at _____ ____ Ruling on _____ set for _____ at _____

(7) ____ Status hearing ___ held ____ continued to ____ set for _____ reset for _____ at _____

(8) ____ Pretrial conference ___ held ____ continued to ____ set for _____ reset for _____ at _____

(9) ____ Trial ____ set for ____ reset for _____ at _____

(10) ____ ____Bench trial ____Jury trial ____Hearing held and continued to _____ at _____

(11) ____ This case is dismissed ___ without ____ with prejudice and without costs _____ by agreement _____ pursuant to ____FRCP 4(j) (failure to serve) ____ General Rule 21 (want of prosecution) ____ FRCP 41(a)(1) ____ FRCP 41 (a)(2)

(12) __x_ (For further details see __x__ order on the reverse of _____ order attached to the original minute order form.)

_____ No notices required.
_____ Notices mailed by judge's staff.
_____ Notified counsel by telephone.
__x__ Docketing to mail notices.
_____ Mail AO 450 form.
_____ Copy to judge/magistrate

Courtroom deputy's initials
l/s - MG

Date/time received in central Clerk's Office
ED-5
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90 NOV 13 PM 4:14

Document # 15

(Reversed for use by the Court)

Evidentiary Hearing Before
Magistrate Weisberg

ORDER

After first making a finding of probable cause on the preliminary examination, the magistrate considered the government's motion for detention.

In determining whether there were any conditions of release that would reasonably assure the safety of <u>any person</u> and the community the magistrate reviewed the evidence in accordance with the factors promulgated in 18 U.S.C. § 3142(g). First, the magistrate considered the nature and circumstances of the offense charged, including whether the offense is a crime of violence. The magistrate found this kidnapping charge to be a crime of violence. Second, the magistrate considered the weight of the

evidence against defendant and found it to be sufficient. Third, the magistrate considered the defendant's history and characteristics. The magistrate found that while defendant does not have a substantial criminal history, a plausible motive for defendant's conduct exists. Finally, the magistrate considered the nature and seriousness of the danger to any person or the community that would be posed by the defendant's release. The magistrate found that the government had established by clear and convincing evidence that defendant is a serious risk to the safety of the community and that there is no condition or combination of conditions that will reasonably assure the safety of the community.

District Court Review of Magistrate's Ruling

This court made a de novo review of the transcript of the proceeding before the magistrate. This court does not disagree with the magistrate's findings. A factor to be considered in determining the appropriateness of pre-trial detention is the nature and seriousness of danger that would be pose to any person or the community. Defendant's danger to Rosemary Krager falls within that definition and is thus properly considered. Therefore, pre-trial detention of the defendant is ordered. Further, the defendant's petition for a writ of habeas corpus is denied.

While continued detention is ordered, it is also ordered that defendant shall get the medical care that she has requested. The court finds her request to be reasonable and therefore, it shall

be provided, along with any other reasonable medical requirements. Further the defendant shall not be forced to undergo medical treatment which she does not desire.

/ls George M. Marovich
Judge

PRETRIAL SERVICES REPORT

District Office:
NORTHERN ILLINOIS, CHICAGO

Charge(s) (Title, Section and Description):
KIDNAPPING

Judicial Officer:
HONORABLE BERNARD WEISBERG

Docket Number (Year-Sequence No.-Deft. No.):

DEFENDANT

Name:
SHIRLEY SIMNICK

Employment/School:
M & C CONSULTANTS

Address:
17 JANE STREET
GLENWOOD, IL.

Address:

Time at Address:
TEN YEARS

Time in Community:
TWENTY-FIVE YEARS

Monthly Income:
$35,000

Time in Empl./School:
SEVEN YEARS

DEFENDANT HISTORY

1. DEFENDANT HISTORY/RESIDENCE/FAMILY TIES
2. EMPLOYMENT HISTORY/FINANCIAL RESOURCES
3. HEALTH
4. PRIOR RECORD
5. ASSESSMENT OF FLIGHT/DANGER

1. Defendant History Ms. Simnick reports that she was born in Tupelo, Mississippi forty-five years ago and has lived in the Chicago area for the past twenty-five years. She advised that she is divorced and presently lives alone at the above address. This is a home which she now owns, she says, and in which she has resided for the past ten years. The address is verified by her drivers license, issued in July of 1988.

According to her statement, her sister, Dorothy Ciecreski, lives in Chicago (St. Margaret's Hospital where she is dying of cancer); her father and another sister live in Topeka, Kansas. She has two children, she says, a son in Topeka and a daughter in Crete, Illinois.

2. Employment/Financial Condition For the past seven years, she says, the defendant has been a booking agent for entertainment acts, earning $417,000 last year. This is a business, M & C Consultants, which she owns. She estimates her home to be worth about $100,000 and says that she is paying a mortgage on a home in Florida in which she has about $120,000 in equity. She believes that her family would be willing to assist her in securing a bond if asked

to do so. At this time she feels that she would rather not have her father notified of her arrest because he is under so much stress over his other daughter's impending death, so I have not verified this information.

3. Health The defendant reports that she is suffering from breast cancer at the present and has refused chemotherapy treatment. She takes no medication, she says. No dependency problems are reported and her behavior during the interview with Pretrial Services gave no indication of impairment.

4. Prior Record A name check with the FBI reveals one prior arrest. In 1985 she was charged in Glenwood with Unlawful Use of a Weapon and not having a Firearms Owner's ID card. No disposition is listed, although she says that she was given eighteen months of court supervision.

5. Assessment The defendant's background, as it is known to me, suggests that she would not be a flight risk if released. Her prior record shows that she has lived in this area at least since 1985. If her family ties are as she says, and I have no reasons to suspect they are not, flight is not a concern.

I have not been able to reach the Assistant United States Attorney before writing this report. Absent any charging information, it is difficult to know if any danger to anyone might occur if Ms. Simnick were released. Based on what is known to me at this time, release is recommended.

RECOMMENDATION

Release:

PERSONAL RECOGNIZANCE	____
UNSECURED APPEARANCE BOND	____
PROPERTY AS COLLATERAL	____
CASH DEPOSIT (1 TO 100%)	____
CORPORATE SURETY	____
THIRD PARTY CUSTODY	____
PRETRIAL SERVICES SUPERVISION	____
UNDERGO TREATMENT	____
OTHER CONDITIONS	____

Provide specific conditions to the right

Conditions:
RELEASE RECOMMENDED, NO SPECIFICS

Temporary Detention (18 USC 3142(d))	____
Detention	____

Pretrial Services Officer:
JAMES W. TIBENSKY

Date:
10/5/90

Time:
3:00 P.M.

(2)

No. 90-1196

Supreme Court, U.S.
FILED
MAR 11 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

SHIRLEY SIMNICK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

PATTY MERKAMP STEMLER
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the district court properly ordered that petitioner be detained prior to trial pursuant to the Bail Reform Act of 1984 on the ground that no condition of pretrial release would reasonably assure the safety of other persons and the community.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1196

SHIRLEY SIMNICK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The orders of the court of appeals (Pet. App. A2-A4), the district court (Pet. App. A9-A13), and the magistrate (App., *infra*) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 1990. A petition for rehearing was denied on January 8, 1991. The petition for a writ of certiorari was filed on January 25, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On October 5, 1990, FBI agents arrested petitioner on a criminal complaint charging her with kidnaping, in violation of 18 U.S.C. 1201(a). The government moved for pretrial detention pursuant to the Bail Reform Act of 1984, 18 U.S.C. 3141 *et seq.* Following an evidentiary hearing before a magistrate in the Northern District of Illinois, petitioner was ordered detained pending trial. Petitioner sought review of the detention order in the district court. Following a further hearing, the district court denied her motion for release on bail. The court of appeals affirmed. On February 7, 1991, the grand jury returned a 38-count indictment charging petitioner with various racketeering and other offenses, kidnaping, and obstruction of justice.[1] A hearing on pretrial motions is scheduled for March 22, 1991, at which time a trial date should be set. Petitioner continues to be detained pending trial.

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[1] The indictment specifically charged petitioner with conspiracy to conduct the affairs of an enterprise, namely, a prostitution network, through a pattern of racketeering activity (RICO) (Count 1), in violation of 18 U.S.C. 1962(d); a substantive RICO offense (Count 2), in violation of 18 U.S.C. 1962(c); causing an individual to travel in interstate and foreign commerce with the intent to promote prostitution offenses (Count 3), in violation of 18 U.S.C. 1952; inducing an individual to travel in interstate commerce to engage in prostitution (Counts 4-33), in violation of 18 U.S.C. 2422; obstruction of justice (Counts 36 and 38), in violation of 18 U.S.C. 1503; and kidnaping (Count 37), in violation of 18 U.S.C. 1201(a). Although an indictment must usually be filed within 30 days of arrest under the Speedy Trial Act, 18 U.S.C. 3161(d), the district court extended the 30-day period due to the complexity of the investigation into petitioner's racketeering activity.

1. At the pretrial detention hearing, the government relied on the testimony of FBI Special Agent Royden Rice.[2] Agent Rice testified that petitioner operated a prostitution network, called M & C Consultants, from her home in Glenwood, Illinois. Petitioner advertised her company as an escort service providing escorts for customers in the Chicago area for lingerie modeling and other entertainment, but in fact the escort service was a front for prostitution. Rosemary Krager worked for petitioner's business for two years. She answered incoming calls from customers, arranged "dates" between customers and the prostitutes, and dispatched the prostitutes and their drivers to meet customers. Gov't C.A. Br. 4-5.

In 1990, Krager agreed to cooperate with the FBI as a confidential informant. In September 1990, petitioner began to suspect that she was under investigation. On September 16, 1990, she met with her employees in a hotel room and instructed them not to cooperate with the authorities. On October 4, 1990, when Krager arrived at petitioner's residence to begin working, petitioner asked Krager if she was cooperating with the FBI. When Krager denied that she was cooperating, petitioner pulled a semi-automatic pistol from her purse. Krager then admitted that she was assisting the FBI. Gov't C.A. Br. 5-6.

Petitioner questioned Krager extensively about her cooperation. Petitioner also informed Krager that

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[2] Agent Rice based her testimony on knowledge gained through personal observation, by listening to electronically intercepted conversations between petitioner and an undercover agent and between petitioner and a confidential informant, and through interviews with the informant and other agents. Gov't C.A. Br. 9.

the wife of a reputed mobster who had testified against petitioner's husband in federal court is not safe now because "we will get her." Krager understood the remark as a threat that if Krager testified against petitioner, Krager too would be in danger. Petitioner strip searched Krager and searched Krager's purse, removing a piece of paper listing the telephone number of Krager's FBI contact. Petitioner then led Krager out of the house, ordered Krager to lie on the floor in the back seat of petitioner's Cadillac, and covered Krager with a blanket. Petitioner drove to her attorney's office, left a message for him, and returned to her home to await her attorney's call. Gov't C.A. Br. 6-7.

That evening, petitioner ordered Krager back into the Cadillac and drove her to Indiana, where petitioner visited her sister in a hospital. Petitioner, who carried the pistol in her purse, was accompanied on the trip by another sister, Linda Anderson, and her sister-in-law, Mary Price. The three women did not leave Krager alone at any point that evening. After the hospital visit, the four returned to petitioner's home. Petitioner went upstairs, leaving Krager in the kitchen with Price and Anderson. While petitioner was upstairs, Krager ran for her car, jumped in, and locked the door. As Price and Anderson pounded on her car windows, Krager drove away. Petitioner then pursued Krager in her Cadillac. After ten minutes, Krager saw a police officer and sought his help. The officer put Krager in protective custody and contacted the FBI. Gov't C.A. Br. 7-9.

Petitioner was arrested the following morning. Pursuant to a warrant, FBI agents searched her home and found the owner's manual for a semi-automatic pistol, a partially empty box of ammunition for a

pistol, the piece of paper that petitioner had removed from Krager's purse, and more than $100,000 in cash. Although Krager had previously seen two handguns and two rifles at petitioner's residence, none was recovered that morning. Petitioner has a prior conviction for unlawful use of a weapon. Gov't C.A. Br. 9.[3]

2. Based on the evidence presented at the hearing, the magistrate found that the kidnaping offense constituted a crime of violence and that petitioner had threatened Krager both verbally and with a handgun. App., *infra*, 2a. The magistrate found that the government had presented sufficient evidence of the kidnaping to support the charge. The magistrate also found that petitioner had previously been charged with unlawful use of a weapon and that she had a motive for the kidnaping, namely, to frustrate the investigation of her prostitution network. The magistrate then concluded, "[c]onsidering the nature and seriousness of the danger to Krager that would be posed by [petitioner's] release, the Court finds that a serious risk that [petitioner] will attempt to obstruct justice or attempt to threaten, injure or intimidate Krager or others in the community exists." *Id.* at 3a. The magistrate also found that "the government has established by clear and convincing evidence that [petitioner] is a serious risk to the safety of the community, and that there is no condition or combination of conditions that will reasonably assure the safety of the community." *Ibid.*

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[3] Mary Price, Linda Anderson, and petitioner's brother-in-law, who had seen Krager at the hospital in Indiana, testified on petitioner's behalf that Krager was not held against her will on the evening of October 4, and that she left petitioner's home peacefully. Gov't C.A. Br. 10.

Accordingly, the magistrate granted the government's motion for pretrial detention. *Ibid.* See 18 U.S.C. 3142(e).

Following a de novo review of the record, the district court adopted the magistrate's findings. The district court continued petitioner's detention because petitioner is a "danger to Rosemary Krager." Pet. App. A12. The court of appeals affirmed. The court concurred in the finding of the district court that "no combination of conditions would reasonably assure the safety of the community if [petitioner] were released on bond." *Id.* at A3.

ARGUMENT

Since the petition was filed, petitioner has been indicted on charges of kidnaping, obstruction of justice, racketeering and other offenses relating to the operation of her prostitution network. Consequently, to the extent that petitioner contests her detention because it preceded the return of the indictment (see Pet. 37-46), that claim is now moot.[4]

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[4] In any case, the Bail Reform Act authorizes pretrial detention of an "arrested person" even before an indictment is returned. 18 U.S.C. 3141(a). See, *e.g.*, *United States* v. *Simpkins*, 826 F.2d 96 (D.C. Cir. 1987). There is no merit to petitioner's claim (Pet. 45-46) that the four-month period between her arrest and the return of the indictment violated the Speedy Trial Act. Although the Act requires indictment within 30 days of arrest, that 30-day period is subject to expansion by excludable delay. See 18 U.S.C. 3161(b) and (h). In this case, the district court granted excludable ends-of-justice continuances, pursuant to Section 3161(h)(8) of the Act, to give the government additional time to pursue its investigation of petitioner's illegal activities. Petitioner's kidnaping of Krager abruptly ended an undercover investigation of petitioner's escort service before the government was prepared to indict. Once petitioner was arrested and the busi-

The court of appeals properly rejected petitioner's claim that the government failed to demonstrate that "no condition or combination of conditions will reasonably assure * * * the safety of any other person and the community." 18 U.S.C. 3142(e). Agent Rice testified that petitioner has twice attempted to obstruct the criminal investigation. First, at a meeting in a hotel on September 16, 1990, petitioner advised her employees not to cooperate with the FBI. Second, on October 4, she kidnaped government informant Rosemary Krager at gunpoint and threatened Krager that she would be punished if she testified against petitioner. Petitioner held Krager for ten hours before Krager escaped, and even then petitioner pursued Krager in her car until Krager obtained the protection of a police officer. Moreover, petitioner has a prior conviction for illegal use of a weapon. In short, the evidence plainly showed that petitioner would take drastic measures to insulate herself from criminal prosecution and that she therefore poses a serious threat to the safety of the community. See *United States* v. *Delker*, 757 F.2d 1390, 1400-1401 (3d Cir. 1985) (finding that no condition or combination of conditions would reasonably assure the safety of the community where defendant threatened and intimidated witnesses after learning of a government investigation into his business activities).

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ness ceased, the government was required to pursue its investigation by different means. In short, petitioner's violent interference with the investigation required the government to seek excludable continuances. Petitioner is therefore not entitled to release under the Speedy Trial Act. See 18 U.S.C. 3164(b) (periods of excludable delay also extend the 90-day limit on pretrial detention).

Petitioner nevertheless argues (Pet. 26-34) that the district court should not have credited Agent Rice's testimony because it was hearsay. The Federal Rules of Evidence do not apply, however, to pretrial detention hearings. Fed. R. Evid. 1101(d)(3); 18 U.S.C. 3142(f). Therefore, to the extent that Agent Rice's testimony was hearsay, it was nevertheless admissible. See *United States* v. *Fortna*, 769 F.2d 243, 250 (5th Cir. 1985); *United States* v. *Acevedo-Ramos*, 755 F.2d 203, 207-208 (1st Cir. 1985). Moreover, the testimony was reliable.

Although Agent Rice's description of the kidnaping came from information that she had received from the victim, Rosemary Krager, Krager's version of the events was corroborated by evidence seized from petitioner's residence the following morning, which included a manual for a semi-automatic pistol, ammunition for the pistol, and the piece of paper that petitioner had removed from Krager's purse. Krager's story was also corroborated by the fact that she sought the protection of the first police officer she saw after fleeing from petitioner's home.

To support her claim that Agent Rice's testimony was insufficient to establish dangerousness, petitioner relies on the testimony of her own witnesses (her sister, sister-in-law, and brother-in-law) that Krager was not detained against her will. Pet. 29-31. But as those witnesses acknowledged, if they had testified to the contrary they would have been admitting their guilt as accomplices to the kidnaping. See Gov't C.A. Br. 10. The decision of both courts below to discredit their testimony should not be disturbed here. See *United States* v. *Portes*, 786 F.2d 758, 763 (7th Cir. 1985) (appellate court must give great weight to the credibility assessments of the judicial officer at a detention hearing).

There is no merit to petitioner's argument (Pet. 34-35) that pretrial detention is unwarranted because conviction on the kidnaping charge is "unlikely" or would not be "sustainable." Specifically, petitioner argues that Krager was not kidnaped because she was free to leave. Although petitioner's relatives testified at the detention hearing that Krager had many opportunities to escape, both the magistrate and the district court rejected that version of the facts. At trial, the jury will likewise be free to discredit petitioner's evidence in favor of the government's proof that Krager was forcibly detained against her will for ten hours. The government was not required to prove the kidnaping charge beyond a reasonable doubt at the detention hearing. To the contrary, "Section 3142 neither requires nor permits a pretrial determination that the person is guilty." *United States* v *Winsor*, 785 F.2d 755, 757 (9th Cir. 1986).

Petitioner's claim (Pet. 37) that the detention order lacked the findings required by 18 U.S. 3142(i) is simply wrong. The magistrate issued a four-page detention order that was replete with findings of fact, including a finding that "the government has established by clear and convincing evidence that [p]etitioner is a serious risk to the safety of the community, and that there is no condition or combination of conditions that will reasonably assure the safety of the community." App., *infra*, 3a. The district court's order incorporated and adopted the magistrate's findings. Pet. App. A9-A13. Further elaboration was not required.

Nor are the orders deficient because they fail to explain why certain conditions of release would be inadequate. Petitioner suggests (Pet. 21-25) that

the district court should have considered placing Krager in the Witness Protection Program, monitoring petitioner, or prohibiting her from using firearms. With respect to the first suggested condition, the district court correctly observed that placing Krager in the Witness Protection Program would be tantamount to "incarcerating the victim so that [the kidnaper] can be free." Gov't C.A. Br. 17. After finding that petitioner had just used a pistol to kidnap the government's informant, the district court did not have to justify further why the latter two conditions would be inadequate to protect Krager and other potential witnesses from harm. See *United States* v. *Simpkins*, 826 F.2d 94, 97 (D.C. Cir. 1987). In short, both courts below correctly found that the government proved by clear and convincing evidence that no condition of release would assure the safety of Rosemany Krager or other prospective government witnesses. Further review of that factbound claim is not warranted.

Petitioner also contends (Pet. 20-21, 33-34) that the district court did not review "de novo" her request for release on bail because the district court relied on the record made before the magistrate and did not hear any additional evidence. The district court was not required, however, to conduct a new evidentiary hearing. Although the Bail Reform Act permits a defendant to file with the district court a motion for revocation of a magistrate's order of detention (18 U.S.C. 3145(b)), it does not require a new evidentiary hearing. Instead, Section 3145(b) simply requires the district court to determine the motion "promptly." Nor does the Federal Magistrates Act, 28 U.S.C. 631 *et seq.*, give the defendant a right to a new evidentiary hearing. 28 U.S.C.

636(b)(1)(A); *United States* v. *Raddatz*, 447 U.S. 667, 673-676 (1980) (even where "de novo" review is required, the district court is not required to hear testimony). In sum, there is no merit to any of petitioner's challenges to her pretrial detention.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1991

[5] To the extent that petitioner claims that her detention violates due process, that claim was rejected by this Court in *United States* v. *Salerno*, 481 U.S. 739, 746-752 (1987).

APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 90 CR 850
Magistrate Bernard Weisberg

UNITED STATES OF AMERICA

v.

SHIRLEY SIMNICK

[Filed Oct. 16, 1990]

PRETRIAL DETENTION ORDER

Defendant Shirley Simnick appeared before this Court on October 9, 1990 for preliminary examination, and for a hearing on the government's motion, pursuant to 18 U.S.C. § 3142(f)(2)(B), to detain defendant pending trial. Defendant was present with retained counsel. The Court reviewed a pretrial services report, and received the testimony of FBI Special Agent Royden Rice, on behalf of the government, as well as Mary Price, Harold Czierski and Linda Anderson, on behalf of defendant. The Court further heard the argument of counsel.

Subsequent to a finding of probable cause on the preliminary examination, the Court considered the government's motion for detention. In determining whether there are conditions of release that would reasonably assure the safety of any person and the

community, the Court reviewed the evidence in accordance with the factors promulgated in 18 U.S.C. § 3142(g).

First, the Court considered the nature and circumstances of the offense charged, including whether the offense is a crime of violence. Defendant is charged with the crime of kidnapping, 18 U.S.C. § 1201(a). The government presented evidence that it has been investigating a business that defendant operated out of her Glenwood, Illinois residence, which business, M & C Consultants ("M & C"), is a front for a prostitution network. During the course of the investigation, an M & C employee, Rosemary Krager, cooperated with the government. On October 4, 1990, defendant questioned Krager about whether she was an informant, and threatened Krager with a handgun. Defendant also made intimidating and threatening comments to Krager. Krager consequently admitted her role as an informant. Defendant subsequently drove Krager from Glenwood, Illinois, to Hammond, Indiana, and later returned to defendant's residence that evening. Considering the nature and circumstances of the kidnapping charge, the Court finds it to constitute a crime of violence.

Second, the Court considered the weight of the evidence against defendant. The government presented evidence to support its charge that defendant kidnapped Krager. Defense counsel presented evidence to rebut that charge. The Court finds the weight of the evidence sufficient at this time, and notes that there may be a credibility question for a jury to determine.

Third, the Court considered defendant's history and characteristics. The government presented evidence that defendant has a previous unlawful use of weapons charge. The government also presented evi-

dence that defendant's escort service served as a pretext for a prostitution network. Evidence concerning the nature of defendant's business was based on a lengthy investigation by the FBI. Considering the defendant's history and characteristics, the Court finds that defendant does not have a substantial criminal history. The Court finds further, however, that a plausible motive for defendant's conduct exists, on the basis of the FBI investigation and Krager's employment with defendant's business.

Finally, the Court considered the nature and seriousness of the danger to any person or the community that would be posed by defendant's release. The government presented evidence that Krager was cooperating with the government in an undercover capacity. Additional evidence was presented that defendant brandished a handgun and threatened and intimidated Krager, a prospective government witness. Considering the nature and seriousness of the danger to Krager that would be posed by defendant's release, the Court finds that a serious risk that defendant will attempt to obstruct justice or attempt to threaten, injure or intimidate Krager or others in the community exists.

For all of the foregoing reasons, as well as those stated in open court, the Court finds that the government has established by clear and convincing evidence that defendant is a serious risk to the safety of the community, and that there is no condition or combination of conditions that will reasonably assure the safety of the community.

THEREFORE, IT IS ORDERED that the government's motion to detain defendant Shirley Simnick is GRANTED.

IT IS FURTHER ORDERED:

1. That defendant be committed to the custody of the Attorney General for confinement pending the disposition of this case.

2. That defendant be confined in a corrections facility separate, to the extent possible, from prisoners awaiting or serving sentences or being held in custody pending appeal.

3. That defendant be afforded reasonable opportunity for private consultation with her attorney.

4. That upon order of a Court of the United States or upon request of an attorney for the government, the person in charge of the correctional facility in which defendant is detained, deliver defendant to the United States Marshal for the purpose of her appearance in connection with court proceedings.

/s/ Bernard Weisberg
BERNARD WEISBERG
United States Magistrate

Dated: October 16, 1990

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